

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA

PEGGY PHELPS, a single person; JUDY GRANT, a single person; DIANA HOUSE, a single person; SUSAN MATTHEWS, a single person; ANGELA CREEL, a single person; MICHELLE CORY, a single person; JEFF ROWLING and BRENDA ROWLING, husband and wife, and the marital community thereof; CHARLES DOONAN, a single person; and THARA EANG and CRYSTAL EANG, husband and wife, and the marital community thereof,

Plaintiffs,

v.

OCEAN SHORES ASSOCIATES, L.P., a Washington limited partnership; and OLYMPIC MANAGEMENT CO., a Washington corporation; and THE UNITED STATES OF AMERICA,

Defendants.

Case No. C06-5512RJB

ORDER

This matter comes before the Court on Plaintiffs' Motion for Continuance of Defendant Olympic Management's Motions for Summary Judgment Under Rule FRCP 56(f) and Continuance of Discovery Deadline. Dkt. 61. The Court has reviewed all documents filed in support of and in opposition to these motions, has reviewed the entire file, and is fully advised.

1 **I. BASIC and PROCEDURAL FACTS**

2 Originally filed in Grays Harbor County Washington in 2004, this action was removed to this Court
3 on September 7, 2006 by the United States of America. Dkt. 1. The case concerns allegations of personal
4 injury and property damage caused by the conditions at a federally subsidized apartment complex for very
5 low, low, and moderate income families. Dkt. 4-2, at 3-21. The apartment complex, known as the Dune
6 Grass Apartments, is located at 807 Anchor Avenue NW, Ocean Shores, Washington. Dkt. 4-2, at 4.
7 Plaintiffs allege that the “moisture related problems, including mold intrusion, bird infestation, and
8 methamphetamine contamination have rendered the units of Plaintiffs uninhabitable or partially
9 uninhabitable, and these conditions pose actual or potential health and safety hazards to the Plaintiffs.”
10 Dkt. 4-2, at 17. Plaintiffs allege that Defendants had actual and/or constructive knowledge of these
11 conditions. Dkt. 4-2. Plaintiffs assert five claims: 1) breach of the Landlord Tenant Act, RCW 59.18, *et*
12 *seq.*, 2) breach of contract, 3) breach of the implied warranty of habitability, 4) premises liability and
13 negligence, and 5) negligent infliction of emotional distress. Dkt. 4-2, at 11-19.

14 The First Amended Complaint names the following Defendants: Ocean Shores Associates, L.P.,
15 (“Ocean Shores”), Olympic Management Company (“Olympic”), and the United States of America. Dkt.
16 4-2. A brief review of the history of the apartment complex and the various entities involved with it is
17 helpful. The First Amended Complaint alleges that in 1987 and 1988, Defendant Ocean Shores entered
18 into an agreement or agreements with the Rural Housing Service for the United States Department of
19 Agriculture (“Rural Housing Service”) in connection with the financing, construction and operation of the
20 apartment complex. Dkt. 4-2 at 11. Ocean Shores is a Washington limited partnership, with Michael A.
21 McKean and Northwest Community Housing Corporation originally as General Partners. Dkts. 25-2, and
22 25-3. In 1996, the apartment complex was placed in receivership, and the Rural Housing Service was
23 appointed Receiver for this and several other apartment complexes. *United States of America v. McKean*,
24 Case No. 96-5879-FDB, (Western District of Washington at Tacoma 1996). As Receiver, the Rural
25 Housing Service was given “all powers, authorities, rights and privileges” previously possessed by the
26 general partners and managing general partners of the “partnerships under applicable state and federal law
27 and by the partnership agreement of said partnerships, in addition to all powers and authority conferred
28 upon the Receiver by the provisions of 28 U.S.C. § 754.” Dkt. 25-3, at 2. Michael A. McKean and

1 Northwest Community Housing Corporation were dismissed as general partners and managing partners.
2 *Id.* Further, the Rural Housing Service, as Receiver, was to “assume and control the operation of the
3 partnership” and was to “pursue and preserve all of its claims and assets.” *Id.*

4 In 1996, Defendant Olympic began managing the apartment complex. Dkt. 20, at 2. Beginning in
5 1999, management agreements between Olympic, as “Agent,” and Ocean Shores, as “Owner,” were
6 executed for the management of the apartment complex. *Id.* Under the management agreement, Olympic,
7 as “Agent” is responsible for day to day management of the apartment complex including: marketing and
8 renting the units, producing reports, collecting the rent, creating a budget, and maintaining and repairing
9 the buildings and grounds. Dkt. 20. The “Owner,” is responsible under the management agreement for the
10 “finances and the financial stability” of the apartment complex. Dkt. 20, at 14. Olympic is required to gain
11 the “Owner’s” approval for expenditures over \$2,500 for maintenance and repairs. Dkt. 20, at 9.

12 Olympic moves for summary dismissal of Plaintiff Peggy Phelps’ claims arguing that: 1) Phelps has
13 failed to provide any expert opinions linking her medical complaints to elevated levels of mold and
14 moisture at the apartment complex, and 2) although Olympic’s discovery requests ask Phelps to provide
15 the evidence of the causal connection between her medical conditions and her tenancy at the complex, her
16 Fed. R. Civ. P. 26(a) disclosures fail to provide a signed report from Gordon P. Baker, M.D., (her
17 identified expert witness). Dkt. 47.

18 Olympic moves for summary dismissal of Judy Grant’s claims, arguing that: 1) Grant has failed to
19 provide any expert opinions linking her medical complaints to the conditions of the apartment complex
20 during her tenancy, and 2) no Fed. R. Civ. P. 26(a) expert opinion report from Dr. Baker has been received
21 by Defendants. Dkt. 45.

22 Olympic moves for summary dismissal of Diana House’s claims, arguing that: 1) House has failed
23 to provide any expert opinion linking her medical complaints to the conditions of the apartment complex
24 during her tenancy, and 2) no Fed. R. Civ. P. 26(a) expert opinion report from Dr. Baker has been received
25 by Defendants. Dkt. 49.

26 Olympic moves for summary dismissal of Susan Matthews’ claims, arguing that: 1) Matthews has
27 failed to provide any expert opinion linking her medical complaints to the conditions of the apartment
28 complex during her tenancy, and 2) no Fed. R. Civ. P. 26(a) expert opinion report from Dr. Baker has been

1 received by Defendants. Dkt. 51.

2 Olympic moves for summary dismissal of Angela Creel's claims, arguing that: 1) she has failed to
3 prosecute her suit against Olympic because she has failed to sign a release permitting the defense to obtain
4 her medical records, 2) she has failed to identify which medical conditions she has, and 3) has failed to
5 provide any expert opinion linking her medical complaints to the conditions of the apartment complex
6 during her tenancy. Dkt. 38.

7 Olympic makes no motion regarding Michelle Cory.

8 Olympic moves for summary dismissal of Jeff Rowling's claims, arguing that: 1) he has failed to
9 prosecute his suit against Olympic because he has failed to sign a release permitting the defense to obtain
10 his medical records, 2) he has failed to identify his medical conditions, 3) has failed to provide any expert
11 opinion linking his medical complaints to the conditions of the apartment complex during his tenancy, 4) no
12 Fed. R. Civ. P. 26(a) expert opinion report from Dr. Baker has been received by Defendants, and 5) his
13 claim is time barred by the three year statute of limitations because he knew of the mold and believed that it
14 was causing him illness in 2000 and 2001, but did not file suit until 2004. Dkt. 53

15 Olympic moves for summary dismissal of Brenda Rowling's claims, arguing that: 1) she has failed
16 to prosecute her suit against Olympic because she has failed to sign a release permitting the defense to
17 obtain her medical records, 2) she has failed to identify her medical conditions, 3) she has failed to provide
18 any expert opinion linking her medical complaints to the conditions of the apartment complex during her
19 tenancy, and 4) her claims are time barred. Dkt. 36.

20 Olympic moves for summary dismissal of Charles Doonan's claims, arguing that: 1) other than his
21 deposition testimony, there is no evidence that Doonan ever resided at the apartment complex, 2) he has
22 failed to prosecute his suit against Olympic because he has failed to sign a release permitting the defense to
23 obtain his medical records, 3) he has failed to identify his medical conditions, 4) has failed to provide any
24 expert opinion linking his medical complaints to the conditions of the apartment complex during his
25 tenancy, 5) no Fed. R. Civ. P. 26(a) expert opinion report from Dr. Baker has been received by
26 Defendants, and 6) his claims are time barred. Dkt. 40.

27 Olympic moves for summary dismissal of Thara Eang and Crystal Eang's claims, arguing that: 1)
28 their claims are time barred, 2) they have failed to provide any expert opinion linking their medical

1 complaints to the conditions of the apartment complex during their tenancy, and 3) no Fed. R. Civ. P.
2 26(a) expert opinion report from Dr. Baker has been received by Defendants. Dkt. 43.

3 Ocean Shores joins in each of Olympic's Motions for Summary Judgment. Dkt. 59.

4 Plaintiffs respond by making a Fed. R. Civ. Pro. 56(f) motion. Dkt. 61. Plaintiffs ask the Court to
5 continue the Motions for Summary Judgment and the discovery deadline (currently set for July 23, 2007)
6 to September 14, 2007. Dkt. 61. Plaintiffs relate that allergist Gordon Baker, M.D.'s deposition is
7 scheduled for July 20, 2007. *Id.* at 3. Plaintiffs state that they have provided Defendants a part of the
8 causation evidence: expert opinions, made after physical investigations of the apartment complex, conclude
9 that higher than healthy levels of mold and methamphetamine exist in the relevant units. *Id.* Plaintiffs
10 request more time to give Dr. Baker sufficient opportunity to review the medical records, physical
11 inspection reports, and other documentation and make his own conclusions regarding the cause of
12 Plaintiffs' medical conditions. *Id.* at 5. Plaintiffs counsel state that they now have the medical release for
13 Charles Doonan, but still have not been able to secure the signatures of Angela Creel, Jeff Rowling, and
14 Brenda Rowling. *Id.* at 6.

15 Olympic opposes the Rule 56(f) Motion and Motion for a Continuance. Dkt. 67. Olympic argues
16 that: 1) a continuance would be futile as there is no proof of a causal connection between tenancy at the
17 apartment complex and any of the Plaintiffs' medical conditions, 2) the Motions for Summary Judgment
18 were noted for July 20, 2007 by agreement with Plaintiffs' counsel, 3) Plaintiffs have failed to identify any
19 factual information that needs to be obtained that could not be obtained in the last three years, 4) the
20 Summary Judgment Motions as to Plaintiffs Doonan, Rowling, and Eng are that their claims are time
21 barred, which is irrelevant to the issue of medical causation, 5) no medical release has been received for
22 either Plaintiff Creel or Doonan, and 6) the pending depositions are irrelevant to the motion for a
23 continuance. Dkt. 67.

24 Ocean Shores also opposes the motions, arguing that: 1) Plaintiffs do not meet their burden under
25 Rule 56(f), and 2) Plaintiffs have not been diligent in their discovery. Dkt. 66.

26 Plaintiffs reply that: 1) the continuance is proper under Rule 56(f) because Plaintiffs have met their
27 burden, 2) Plaintiffs counsel has been diligent in discovery, 3) Doonan and Eng's claims are not barred by
28 the statute of limitations for damages arising under a written contract, 4) established principles favor a

1 continuance, and 5) the Court's order dismissing the United States as a party in this action presents an
2 issue of jurisdiction. Dkt. 70.

3 This opinion will first address the question of whether the Court has jurisdiction, secondly, whether
4 a continuance in the discovery deadline is warranted, and lastly, whether Plaintiffs' Rule 56(f) motion
5 should be granted.

6 **II. DISCUSSION**

7 **A. JURISDICTION**

8 Pursuant to 28 U.S.C. § 1442, this Court has jurisdiction over this matter because the United States
9 is a Defendant. To date, the United States has not been dismissed from this action. The Court's recent
10 order dismissed Olympic's cross claim against the United States. Dkt. 64. It did not, however, address the
11 Plaintiffs' claims against the United States or United States' cross claims against Olympic or Ocean Shores.
12 Although Plaintiffs have filed a Motion to Dismiss the United States Without Prejudice, noted for
13 consideration July 25, 2007 (Dkt. 65), this Court presently has jurisdiction over the case.

14 **B. MOTION TO CONTINUE**

15 Fed. R. Civ. P. 6(b) permits the Court to enlarge the period of time given to respond to an order of
16 the Court for cause shown. Plaintiffs have sufficiently shown cause for an extension of the discovery
17 deadline in the interest of fully and fairly addressing the merits of this matter. However, being mindful that
18 the case was originally filed in 2004, the discovery deadline should be extended from July 23, 2007 to only
19 August 24, 2007. Additionally, in order to give Defendants adequate time to prepare a defense, Plaintiffs
20 should provide Dr. Baker's 26(a) report, in so far as it can be prepared, by July 19, 2007. If a supplement
21 to Dr. Baker's report is required, it should be provided by August 3, 2007 and he may be further deposed
22 regarding any supplement. If Defendants require more time to acquire a rebuttal expert, as is implied in
23 Olympic's response, they may apply to the Court and the issue will be considered, if the parties can not
24 agree. Moreover, Plaintiffs Rowlings and Creel should provide the medical release forms by July 20, 2007
25 or risk sanctions, including dismissal of their claims. The Court notes that signed medical release forms
26 from Charles Doonan are found in the record. Dkt. 62, at 7-8. Plaintiffs' counsel should provide a copy to
27 Defendants. Plaintiff's Motion for a Continuance of Discovery Deadline should be granted. The
28 dispositive motions deadline of August 21, 2007 should be continued to August 31, 2007. No change to

1 the November 19, 2007 trial date is justified at this time.

2 **C. RULE 56(f) MOTION**

3 Fed. R. Civ. P. 56(f) provides,

4 Should it appear from the affidavits of a party opposing the motion that the party cannot for
5 reasons stated present by affidavit facts essential to justify the party's opposition, the court
6 may refuse the application for judgment or may order a continuance to permit affidavits to
be obtained or depositions to be taken or to be had or may make such other order as is just.

7 "[D]enial of a Rule 56(f) application is generally disfavored where the party opposing summary judgment
8 makes (a) a timely application which (b) specifically identifies (c) relevant information, (d) where there is
9 some basis for believing that the information sought actually exists." *VISA International Service Ass'n v.*
10 *Bank Card Holders of America*, 784 F.2d 1472, 1475 (9th Cir. 1986).

11 Plaintiffs' Rule 56(f) motion should be granted and Olympic's Motions for Summary Judgment,
12 joined by Ocean Shores, should be continued to August 21, 2007. Plaintiffs filed their 56(f) motion July 5,
13 several days before their Response was due, making their application timely. Plaintiffs have specifically
14 identified the factual information on causation that is required, and have identified the source of the
15 information, Dr. Baker. Dr. Baker should be given time to review all eleven Plaintiffs' medical records and
16 the other relevant materials in order to make his own conclusions regarding causation. Moreover, in light
17 of the current record, there is some basis for believing that the evidence on causation actually exists.

18 The Court is aware and approves of the professional courtesy that Olympic's counsel extended to
19 Plaintiffs's then counsel, Jerrilynn Hadley, in noting the Motions for Summary Judgment two weeks later
20 than is required by the Rules. However, it appears that Ms. Hadley has moved, and other members of her
21 firm are taking over the case. A short extension of time to acquire discovery is reasonable.

22 Defendants' arguments that some of the Plaintiffs' claims may be time barred may have merit.
23 However, in an effort to address all of the issues raised in the Summary Judgment Motions of those
24 Plaintiffs, a short extension of time is warranted.

25 Defendants Olympic and Ocean Shores should withdraw any of these Motions for Summary
26 Judgment if they are not justified by the evidence on or before August 21, 2007.

27 **D. COURT'S COMMENT**

28 This case, filed in 2004, should have been resolved by settlement or trial long ago - certainly by the
end of 2005. Because of the case's age, counsel can expect that as long as the case is in this Court, it will

1 be treated as a priority in all ways.

2 **III. ORDER**

3 Therefore, it is hereby, **ORDERED** that:

- 4 • Plaintiffs' Motion for Continuance of Discovery Deadline (Dkt. 61) is **GRANTED**, the new
5 discovery deadline is **August 24, 2007**, the new Dispositive Motions Deadline is **August**
6 **31, 2007**;
- 7 • Plaintiffs shall provide Dr. Baker's 26(a) report to Defendants, in so far as it can be
8 prepared, by **July 19, 2007**. If a supplement to Dr. Baker's report is required, it shall be
9 provided by **August 3, 2007**, and he may be further deposed regarding any supplement.
- 10 • Plaintiffs Doonan, Rowlings, and Creel shall provide the medical release forms to
11 Defendants by **July 20, 2007** or risk sanctions, including dismissal of their claims.
- 12 • Plaintiffs' Motion for Continuance of Defendant Olympic Management's Motions for
13 Summary Judgment (Dkt. 61) is **GRANTED**, and Olympic's Summary Judgment Motions
14 (Dkts. 36, 38, 40, 43, 45, 47, 49, 51, and 53) are **CONTINUED** to **August 21, 2007**.

15 The Clerk of the Court is directed to send uncertified copies of this Order to all counsel of record
16 and to any party appearing *pro se* at said party's last known address.

17 DATED this 17th day of July, 2007.

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20 Robert J Bryan
21 United States District Judge
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